

Subject: Suriel - rejection of IME notice
Date: Wednesday, May 26, 2021 at 4:27:14 PM Eastern Daylight Time
From: Gabriel Harvis
To: Valletta, Christopher J
CC: Miller, Kathleen, Baree Fett
Attachments: image001.png, image002.png, image003.png, image004.png, image005.jpg

Good afternoon,

Having researched the matter, we reject the purported IME notice and will oppose defendants' Rule 35(a)(1) application in its present form. As the Hon. James Orenstein has explained:

Pursuant to Federal Rule of Civil Procedure 35:

The court where the action is pending may order a party whose mental or physical condition ... is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner ... [The order] may be made only on motion for good cause.

Fed.R.Civ.P. 35(a)(1)-(2)(A). Rule 35 requires "discriminating application" by the trial judge. *Schlagenhauf v. Holder*, 379 U.S. 104, 117-18, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). While the movant need not prove its case on the merits, a movant can neither meet his burden to demonstrate that an adversary's "mental ... condition ... is in controversy" nor satisfy the "good cause" requirement "by mere conclusory allegations of the pleadings [or] by mere relevance to the case ..." *Id.* Rather, the movant must make "an affirmative showing ... that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Id.* What constitutes "good cause" depends on the circumstances of the case, including the movant's ability to obtain the information it seeks by other means. *Id.*

Jarrar v. Harris, No. CV07-3299(CBA)(JO), 2008 WL 2946000, at *3 (E.D.N.Y. July 25, 2008)

Thus, not only are defendants required to obtain an order on a showing of good cause in order to conduct an exam, but the order must "specify the...manner, conditions, and scope of the examination." None of that information is contained in the purported notice served last week.

In the interest of cooperation, we would be willing to confer about manner, condition and scope in an effort to reach agreement so that we can offer our consent to defendants' motion. But as it stands we oppose it and the examination is not going forward.

To the extent that an examination is conducted, please work with us to schedule the date and note that a member of our office staff will accompany Mr. Suriel. We also will be stenographically recording the proceeding and request a copy of the report and all drafts and notes in accordance with FRCP 34 and 35(b)(5). Also, we will be deposing the examiner at a convenient date and time.

We are available any time if you would like to discuss.

Thanks,
Gabe

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From: Valletta, Christopher J <cjvalletta@panynj.gov>
Date: Wednesday, May 26, 2021 at 2:49 PM
To: Gabriel Harvis <gharvis@elefterakislaw.com>
Cc: Miller, Kathleen <kmiller@panynj.gov>, Baree Fett <bfett@elefterakislaw.com>
Subject: RE: Expert Demand

June 23rd at 4:30pm with Dr. Casden is confirmed for plaintiff's IME. A Spanish interpreter will be provided at the doctor's office.

Please also see attached notices of deposition for Dr. Oribe and Dr. Salehin. Subpoenas to these doctors will follow and we will provide a copy of any subpoenas we serve to you in accordance with the federal rules.

From: Gabriel Harvis <gharvis@elefterakislaw.com>
Sent: Wednesday, May 26, 2021 2:05 PM
To: Valletta, Christopher J <cjvalletta@panynj.gov>
Cc: Miller, Kathleen <kmiller@panynj.gov>; Baree Fett <bfett@Elefterakislaw.com>
Subject: Re: Expert Demand

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Good afternoon,

This request is improper. First, the timing for expert disclosures is governed by FRCP 26(a)(2)(D) and fact discovery does not close until August 2, 2021. Second, the only experts required to provide the disclosures defendants are requesting are those “retained or specially employed to provide expert testimony in the case” and that requirement does not apply to plaintiff’s treating doctors. See FRCP 26(a)(2)(B). Plaintiff previously identified doctors he intends to call at trial by disclosure dated May 5, 2021.

Also, we will need to move the IME you noticed for June 2nd to later in the month. Would 22nd or 23rd of June work?

Thanks,
Gabe

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From: Valletta, Christopher J <cjvalletta@panynj.gov>
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Subject: Expert Demand

Good afternoon please see attached.

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